

INITIAL STATEMENT OF REASONS

CALIFORNIA CODE OF REGULATIONS

Title 9. Rehabilitative and Developmental Services

Division 1. Department of Mental Health

Chapter 4.5. Patients' Rights and Related Procedures for Non-Lanterman-Petris-Short Act Patients in Department of Mental Health Facilities

Long Term Care Services (LTCS) in the Department of Mental Health (DMH) is responsible for the direct operation of four state hospitals: Atascadero, Metropolitan, Napa, and Patton. The patients treated in a DMH facility are classified on the basis of legal class or type of commitment. Lanterman-Petris-Short (LPS) commitments result when, upon psychiatric evaluation, a person is found to be a danger to themselves, or others, or to be gravely disabled as a result of their mental disorder. These persons are referred by local community mental health programs through involuntary civil commitment procedures pursuant to the LPS Act (Part 1 (commencing with Section 5000) of Division 5 of the Welfare and Institutions Code).

There are various categories of patients who are committed to or placed in state hospitals pursuant to legal authority other than the LPS Act. Among others, these non-LPS patients include Not Guilty by Reason of Insanity (NGI) (Section 1026 of the Penal Code), Incompetent to Stand Trial (IST) (Section 1370 of the Penal Code), Mentally Disordered Offenders (MDO) (Section 2960 of the Penal Code), and transfers from the California Department of Corrections. The judicially committed or penal code commitments, often referred to as forensic commitments, result from a person being charged with a crime and subsequently being found to be suffering from a mental disorder. AB 888, (Rogan) Chapter 763, of the Statutes of 1995, established a new commitment statute, Welfare and Institutions Code Section 6600 et seq., for the treatment of sexually violent predators (SVPs). This statute is the most recently enacted non-LPS commitment.

AB 904 (Farr, Chapter 1313 Statutes of 1989) required the development of a master plan for the delivery of mental health services. Realignment occurred in FY 1991-1992, and placed responsibility for local mental health program design and delivery at the local level, which permitted greater flexibility. Before realignment, the population in the state hospitals was divided at about 50 percent LPS and 50 percent non-LPS. Currently, approximately 20 percent of state hospital patients are LPS, while 80 percent, come from the court system, through a referral from the California Department of Corrections (CDC) or other non-LPS commitments.

The rights identified in Section 5325 of the Welfare and Institutions Code were expressly designed for and apply only to persons involuntarily detained for evaluation and/or treatment under the provisions of the LPS Act or voluntarily admitted for

psychiatric evaluation or treatment to any mental health facility. The LPS patients' rights are appropriate and adequate for the LPS population residing in state hospitals and community mental health facilities.

There are no distinct patients' rights in statute for the non-LPS patients in the state hospitals and other DMH administered programs. The non-LPS patients are a significantly different population from the LPS patients that receive treatment in a state hospital and that previously constituted a much larger percentage of the patients in state hospitals. Most non-LPS patients come from a county jail or a state prison setting and have a tendency to be far more criminally sophisticated than LPS patients. In addition, many non-LPS patients are potentially assaultive based on their history. The SVPs are also potentially assaultive due to their predatory natures. Further, although the SVPs have diagnosed mental disorders, they are generally not psychotic, as are a majority of the LPS patients found in an acute psychiatric hospital. Therefore, non-LPS patients require special consideration related to patients' rights in order to accommodate and ensure the safety and security of the institution, staff, other patients and the public. While rights have been administratively implemented for non-LPS patients to meet the existing safety and security needs of the facility and public safety, such administrative policies are subject to challenge and litigation and should be formalized in regulation.

The Department also reviewed Title 15 of the California Code of Regulations, to ensure that the rights of patients in the state hospitals will not be more restrictive than the rights of inmates incarcerated under the responsibility of the California Department of Corrections. Finally, the Department attempted to ensure that non-LPS patients' rights are balanced with the recognized need for the safety and security of all, including patients, staff, the facility and the public.

The establishment of non-LPS patients' rights regulations will:

1. Take into account that the non-LPS patients have well-documented histories of victimizing others, with some having a history of violent sexual assaults. The experience of the Department has indicated that from time to time individual patients will exhibit behavior that disrupts the orderly operation of the treatment program and endangers the safety and security of others in the facility.
2. Allow specific approaches directed toward behavior management and behavior modification that will be more successful with the non-LPS patient population. These approaches include increased security and custody, modified but significantly delineated patients' rights, contraband searches, and, when necessary, administrative and protective isolation.
3. Allow for definition of patients' rights and limitations after consideration of state hospital experience. There is a need for new ways to address patient complaints, since not all complaints relate to patients' rights issues. The experience of the Department in recent years indicates that the number of complaints made by non-LPS patients has increased significantly, but that a large portion of these complaints relate to issues not viewed as patients' rights. For example, complaints have included matters ranging from unhappiness with meal selection; policies regarding use of copy machines; and complaints regarding specific treatment prescribed by

the treating psychiatrist. The Department has identified a need to more specifically define patients' rights for non-LPS patients. This clearer specification of non-LPS patients' rights will accomplish several objectives: 1. It will clarify for all involved what matters are properly patients' rights issues for non-LPS patients; 2. It will allow patients' rights issues to be reviewed and addressed by patients' rights advocates while referring other complaints and grievances to hospital/facility management for review and resolution; and, 3. This should allow patients' rights advocates to perform their jobs more efficiently while reducing confusion and litigation related to alleged patients' rights violations.

Article 1. General Provisions

Section 880. Application of Chapter

This Section sets forth the application of the chapter to non-LPS Act patients.

Issues addressed:

This Section is necessary to identify the specific patient population that this Chapter addresses.

Section 881. Definitions, Abbreviations and Program Terms.

This Section contains definitions of important terms.

Issues addressed:

Clarifies the meaning of the key terms used in the regulations.

Article 2. Patients' Rights

Section 882. Notification of Patients' Rights.

This Section specifies requirements for notification of rights to patients.

Issues addressed:

There is a need, similar to that for LPS Act patients, for specific information regarding patients' rights to be clearly communicated to patients with Limited English Proficiency. These rights will be provided in the preferred language or modality of each patient. This will ensure that each non-LPS patient is given information about non-LPS patients' rights while in a secure inpatient facility, avoid confusion, and allow patients to assist in addressing rights violations. The posting requirement further reinforces these goals, reminding both patients and staff as to what rights non-LPS patients have while in the facility.

Section 883. Patients' Rights.

Subsection (a) specifies patients' rights that may not be denied or limited, except in an emergency, or when documented and justified by the facility director, for safety and security reasons. Furthermore, clarification is made in Subsection (a) that these rights may not be waived by a parent, guardian, or conservator, in the absence of a court order conferring such authority.

Issues addressed:

The Department has determined that the rights specified in this Section may need to be denied or limited in situations in which extraordinary measures need to be taken to preserve health, safety, and security. Subsection (a) clarifies that the rights belong to the patient and shall only be modified or denied if the parent, guardian, or conservator has legal authority to do so. In addition, the facility director or designee shall deny a patient any of the rights specified in Subsection (b) of this Section only as necessary to ensure safety and security.

Subsection (b) specifies that any denial or limitation of the rights set forth in this Section must be documented.

Issues addressed:

This Subsection specifies that the Facility director must document the denial and limitation of rights. Further, the justification for such action must be accessible for review by the Patients' Rights Advocate.

Subsection (c) specifies rights to be afforded to patients under this Section.

Issues addressed:

This Subsection introduces a list of rights in Subsections (c)(1)-(14).

Subsection (c)(1) specifies that patients have the right to privacy during personal hygiene activities.

Issue(s) addressed:

Some patients victimize and/or assault themselves, other patients and staff when not closely supervised. These activities have occurred during bathing and showering. In addition, supervision is required during mandatory drug testing, which normally involves providing a urine sample, in order to ensure a clean drug screen.

Subsection (c)(2) specifies a right to receive treatment for a diagnosed mental disorder.

Issue(s) addressed:

State hospitals have a legal obligation to provide care and treatment for those patients committed to or placed in the facility. Additionally, the dangerous behavior of a patient may dictate that treatment be provided in order to provide for the safety of other patients and staff and the security of the hospital.

Subsection (c)(3) specifies a right to essential medical care and treatment for physical ailments and conditions according to acceptable standards and practices.

Issue(s) addressed:

State hospitals have a legal obligation to provide care and treatment for a diagnosed mental disorder for patients committed to or placed in the facility. By not providing treatment, the state hospital is not following state and federal regulations for health care. Additionally, by not providing appropriate treatment the safety of the patient or other patients may be at risk. The hospital has an obligation to protect the health of others and prevent the spread of communicable diseases.

Subsection (c)(4) specifies a right to confidential case discussions, consultation, examination, and patient records. Confidential information shall only be provided to those people providing evaluation and/or treatment or as authorized by law.

Issue(s) addressed:

Although Section 5328 of the Welfare and Institutions Code generally makes patient information and records confidential, statutory provisions also require reporting or disclosure of patient information under certain circumstances. For example, Section 5328.4 requires disclosure to law enforcement when there is probable cause to believe that the patient has committed or been the victim of a crime. As another example, there are reporting requirements in cases in which there is reason to believe that child or elder abuse has occurred. In addition, Sections 43.92 of the Civil Code and 5328(r) of the Welfare and Institutions Code allow for disclosure of information necessary to warn the intended victim of a threat by the patient.

Subsection (c)(5) specifies a right to be informed of the process regarding complaints and of procedures for registering those complaints.

Issue(s) addressed:

This Subsection clarifies the process of notification.

Subsection (c)(6)

A right to access the services of the patients' rights advocate who has no direct or indirect clinical or administrative responsibility for the person receiving mental health services.

Issue(s) addressed:

This Subsection clarifies that the Patients' Rights Advocate has no conflict of interest and ensures that the patients are not subjected to retaliation for filing complaints.

Subsection (c)(7) specifies a right to have access to an attorney through correspondence or private consultation during regularly scheduled visiting days and hours.

Issue(s) addressed:

This Subsection clarifies the process for attorney access during regularly scheduled days and hours. Facilities have had to provide attorney access to patients at all hours and days. The hospitals have difficulties with patients abusing the frequency of contacts, method of communication and in the amount of time demanded from the attorneys.

Subsection (c)(8) specifies a right not to be subjected to abuse or neglect.

Issue(s) addressed:

This Subsection clarifies that the facility takes necessary, reasonable action to prevent patients from being subjected to neglect and/or physical, psychological, sexual, and verbal abuse.

Subsection (c)(9) specifies a right not to be subjected to unnecessary physical restraint or seclusion.

Issue(s) addressed:

This Subsection clarifies that the facility shall only use physical restraint and/or seclusion in emergencies and/or when less restrictive interventions have failed.

Subsection (c)(10) specifies a right to be protected from unnecessary administrative or protective isolation.

Issue(s) addressed:

This Subsection protects the patient from any unnecessary use of administrative and/or protective isolation for the convenience of staff or as a substitute for treatment. The hospitals utilize administrative isolation in specific instances for safety and security. Administrative isolation is utilized by the state hospital Department of Police Services (DPS) only on approval by the facility director. The use of administrative isolation includes situations in which patients may be suspects or parties to criminal activity. This procedure has a daily review and approval process designated in the hospital policy. The use of protective isolation is the confinement of a patient for protection from harm

by others. In addition, the need for a category of protective isolation is based on three issues:

- 1) The commitment of several ex-police officers or high profile individuals.
- 2) The need to protect lesser-capable patients from victimization.
- 3) Patients intentionally inciting other patients into harming them in order to prove the hospital is not protecting them from harm.

Subsection (c)(11) specifies a right to religious freedom and practice. Any practices that pose a potential threat to safety and security of the facility, patients and/or others is limited or denied.

Issue(s) addressed:

Examples of limitations on religious freedom and practices include:

- 1) Patient requests to sacrifice animals in the state hospital.
- 2) Occasions where patients are loudly chanting in the unit hallways at 2 a.m.

Any practice that disturbs other patients, poses a danger or threat to the health and safety of the patient or others, or which may be in direct conflict with patient's treatment plan.

Subsection (c)(12) specifies a right to participate in appropriate programs of publicly supported education.

Issue(s) addressed:

The state hospitals provide and/or arrange for publicly supported education, inside the secure treatment facility, for patients up to the age of 22 years.

Subsection (c)(13) specifies a right to social interaction.

Issue(s) addressed:

"The facility director permits the formation of supervised patients' leisure time activity groups that promote educational, social, cultural and recreational interests of participating patients. The treatment team may limit any practices that pose a threat to safety and security of the facility, patients, and/or others or which are inconsistent with the patient's treatment plan." This provision allows the hospitals to monitor and/or control gang activities, escape plans, acts of retaliation on others, etc. Such activities pose a threat to safety and security of the facility, patients, and/or others and are inconsistent with the patient's treatment plan.

Subsection (c)(14) specifies a right to physical exercise and recreational opportunities as authorized by the facility director. (Reference: Section 5325.1, Welfare and Institutions Code).

Issue(s) addressed:

"...As authorized by the facility director" allows the hospitals to monitor and/or control recreational and physical exercise equipment that is unsafe, or to remove equipment when it is abused. There have been issues with patients using recreational and physical exercise equipment (baseball bats, free-weights, etc.) to assault staff and other patients.

Section 884. Patients' Rights Subject to Denial for Good Cause.

This Section specifies rights that may be denied, defines good cause for denial, it defines the documentation required to justify the denial and the date to restore the rights.

Subsection (a) lists the rights that can be denied for good cause.

Issue(s) addressed:

The Department utilized the standards developed by the California Department of Corrections in Title 15, CCR. This is to ensure that the rights of Non-LPS patients are not more restrictive than the rights of inmates.

Subsection (a)(1) specifies a right to keep and use individual facility approved personal possessions as space permits. (Reference: WIC § 5325, Title 15 §§ 3190 3191)

Issue(s) addressed:

This Subsection prevents the introduction of personal possessions that pose a threat to the safety and security of other patients and staff. Examples include contraband, such as pieces of hardware and saws, introduced into the state hospitals in food containers for use in escape attempts. Contraband is used to destroy locks on doors and windows at state hospitals. Two security audits focused on the need for contraband control: The California State Auditor's March 1998 *Department of Mental Health: Changes in State Hospital Security Measure Can Reduce Annual Costs While Maintaining Public Safety (Contraband, pages 17-20 and 25-27)*; and the December 27, 1999 *State of California Department of Mental Health STATEWIDE SECURITY STUDY FINAL REPORT (Contraband, pages 2-9 through 2-11)*, by Jay Farbstein & Associates, Inc., TheResourceGroup. Many patients have spent years within a prison setting and are more sophisticated than other mental health patients in hiding or making weapons that could harm others or aid in an escape attempt. A critical aspect in the language of this Subsection is the phrase "as space permits".

Subsection (a)(2) specifies a right to have access to individual secured storage space for private patient use as specifically authorized by the facility director.

Issue(s) addressed:

The hospital provides the amount of space required by Section 73659 of Title 22 and the mandates of the State Fire Marshall, for each individual to store personal belongings. For example, a patient wanted to keep multiple boxes of files in his bedroom. The space in which he wants to store his files infringes on the space of others in his room. In addition, the paper, according to the State Fire Marshall, creates a significant fire hazard. The hospital worked with the State Fire Marshall to determine a reasonable amount of space for each patient that did not pose a threat to the safety of all patients. - Factors considered in limiting the space included safety considerations and physical space limitations within the facility.

Subsection (a)(3) specifies a right to keep and spend a sum of the patients' own money via the facility monetary replacement system. In addition, trust account information shall be available for use in transactions.

Issue(s) addressed:

This language was added to allow the hospitals to keep any alternate monetary replacement systems they have in place or may be considering for security purposes. Please refer to the definition in Section 181(l). Spending limits are established consistent with patient treatment goals.

Subsection (a)(4) specifies a right to have personal visits during regularly scheduled visiting days and hours. The facility director may place limitations on the length and frequency of visits and on the number of persons permitted to visit a patient at the same time.

Issue(s) addressed:

Patients receiving visitors each day and visits lasting an excessive length of time interfere with the patient's treatment program as well as the ability of other patients to receive visitors. Additionally, DMH has had two security audits at the state hospitals that have focused on the need for contraband control and visiting procedures: The California State Auditor's March 1998 *Department of Mental Health: Changes in State Hospital Security Measure Can Reduce Annual Costs While Maintaining Public Safety (Contraband, pages 17-20 and 25-27 and Visitation, page 20)*; and the December 27, 1999 *State of California Department of Mental Health STATEWIDE SECURITY STUDY FINAL REPORT (Contraband, pages 2-9 through 2-11 and Visitation, page 2-7 and 2-9)*, by Jay Farbstein & Associates, Inc., TheResourceGroup. The most recent audit recommended incorporation of the following in visiting protocols:

- a) Visitors shall bring no property into the visiting area – food, property or gifts.

- b) A non-contact visiting procedure (close observation or minimum distances between patient and visitor) shall be initiated.
- c) All patients shall be provided with identification badges to be electronically linked to identification.

Experience in clinical treatment and supervision of patients in state hospitals indicates that non-LPS patients should be managed, treated, and supervised differently from LPS patients. Non-LPS patients often demonstrate secretive, exploitive, and manipulative lifestyles. In fact, many of their anti-social behaviors are so well planned that they appear to occur without forethought. Because they typically have developed complicated and persistent psychological and social systems constructed to assist them in denying and minimizing the harm they inflict on others, they are often very accomplished at presenting a façade to others, designed to hide the truth about themselves.

In addition, SVP patients often appear to have a need and ability to manipulate and/or exploit others. This type of behavior places both patients and staff at a higher risk of victimization and requires that a facility invoke different levels of standards and monitoring of security for this patient population.

The minimum age for visiting patients is 18 years. This is a direct result of inappropriate patient behavior. Treatment team approval is required for minor visitation.

Subsection (a)(5) specifies a right to have access to telephones to make and receive calls. The facility director places limitations regarding telephone hours, frequency and duration of calls and method of payment.

Issue(s) addressed:

Sometimes patients monopolize the telephone, refusing to co-operate with staff and infringing upon the rights of other patients to use the phone. Telephone times, number of calls and duration of calls are agreed upon by patients in unit government and become part of the unit rules monitored by staff.

Currency is listed as a contraband item at Atascadero State hospital. Patients have occasionally been found to be stockpiling money for use in escape attempts. In order to prevent hoarding currency for escape and other purposes, each telephone for patient use on residential units is specially designed to receive calls and make only collect outgoing calls.

Subsection (a)(6) specifies a right to have access to letter writing materials and to mail and receive correspondence.

Issue(s) addressed:

All incoming and outgoing mail addressed to and from a patient will be opened and inspected by designated employees of the facility. All patient mail is subject to inspection for contraband by designated employees of the facility but confidential mail shall not be read. The facility director may place limitations on size, weight and volume of mail.

Subsection (a)(7) specifies a right to receive packages. All incoming and outgoing packages addressed to and from a patient will be opened and inspected by designated employees of the facility. The facility director may place limitations on size, weight, volume, and number/frequency of allowed packages.

Issue(s) addressed:

This language has been included to limit the amount of contraband introduced into state hospitals. Additionally, it will aid in the prevention of drug dealing, extortion, gambling, bribery, threats, gang activities and the operation of illegal businesses.

State hospitals have experienced the problem of stamps being used as currency for the purpose of drug dealing. Payment for postage is available via the facility monetary replacement system (as defined in Section 181(I)).

Subsection (a)(8) specifies a right to have access to legal reference material. The facility director may place limitations on the time, duration, frequency and method of access.

Issue(s) addressed:

Highly sophisticated patients are monopolizing the existing legal reference area or law collection in the patient library; thus, preventing equal access to all patients. The hospitals will have law libraries and/or legal references available.

Subsection (b) specifies the conditions for denying any of the rights specified in Subsection (a) of this Section.

Issue(s) addressed:

This language provides limitations for when a facility denies a right. It prevents rights from being denied frivolously and restricts rights denials to only those serious situations that, when there is no less restrictive alternative, would jeopardize the safety or security of the patient, others or the facility.

Subsection (c) specifies that the reason for a denial of a right must be related to the specific right denied.

Issue(s) addressed:

A facility may not arbitrarily deny a patient all of their rights when the exercise of one particular right is the cause for a serious safety or security concern. This language also prevents rights from being denied for staff convenience, as punishment, as a privilege to be earned or as a part of the treatment plan.

Subsection (d) specifies a requirement to document pertinent information related to the denial of a right.

Issue(s) addressed:

This language ensures that sufficient documentation is provided that will clearly specify the reason for the denial, the specific right(s) denied, good cause criteria used, review dates and appropriate authorization. It allows any internal or external reviewer the ability to evaluate whether or not the right was appropriately denied.

Subsection (e) specifies that the patient shall be told of the content of the notation.

Issue(s) addressed:

Patients have the right to know when a right is denied, the reason for the denial, and what must occur or cease to occur to have the right restored. This type of communication will assist the patient in learning what action(s) warrants having a right denied and what they may do in the future to avoid having the right denied again.

Subsection (f) specifies that all denials of a right must be documented.

Issue(s) addressed:

This language is meant to enforce the requirement that all denials be documented and does not allow any exceptions to performing documentation such as certain reasons for denials or the frequency of denials.

Subsection (g) specifies that a right shall not continue to be denied when good cause no longer exists.

Issue(s) addressed:

When the serious action or behavior that warranted the denial of right has abated or no longer exists, the patient should have their right restored. This language ensures that staff will assess actions or behaviors to determine when it may be safe to reinstate the right, or if they can take a less restrictive measure until such time as the right may be fully restored.

Section 885. Patients' Complaint and Appeal Procedure.

This Section provides patients with a mechanism for filing and resolving patients' rights complaints.

Issue(s) addressed:

Describes the methods used to inform patients of their rights and identifies the timelines for the: Patients' Rights Advocate response, appeal of the advocate response, for the facility director response, for appeal of the facility director's response, the timelines for OPR response, and referral to the Department of Mental Health. Timeframes are based on the customary standard of practice for complaint and appeal procedures.

Section 886. Quarterly Reports to the Office of Patients' Rights.

This Section requires the collection and reporting of information regarding the denial of patients' rights.

Issue(s) addressed:

Subsection (a) requires the facility director to file a quarterly report.

Subsection (b) provides a mechanism for further review of details in denials of patients' rights.

Article 3. General Limitations Applicable to Non-LPS Patients.

Section 890. Patients' Clothing.

This Section specifies that patients possess only those items of clothing specifically authorized by the facility director.

Issue(s) addressed:

Section 7232 of the Welfare and Institutions Code, requires the DMH to have a policy that requires patients whose placement is pursuant to provisions of the Penal Code, and other patients within the secured perimeter at each state hospital, to wear clothing that enables these patients to be readily identified. Additionally, patients also have been found to be stockpiling clothing for use in an escape attempt.

Section 891. Internet Usage.

The language of this Section denies patients access to the Internet.

Issue(s) addressed:

Internet usage presents a danger of patients finding web sites that would give them access to victims outside the facility. In addition, accessed materials interfere with patient treatment or provide personal information about staff at the facility. In addition, Internet access is a tool available to employees on state time solely for the purpose of conducting state business.

Section 892. Operating Businesses From Within the Facility.

The language of this Section prohibits patients from conducting business activities within the facility.

Issue(s) addressed:

Conducting a business enterprise within the facility presents a potential conflict with therapeutic care and treatment.